No. 03-15

SEP 17 2003

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA,
PETITIONER,

-vs-

DARREL PETER PANDELI, AKA DARREL PETER FLORIAN,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

REPLY BRIEF

TERRY GODDARD
ATTORNEY GENERAL

KENT E. CATTANI
CHIEF COUNSEL
CAPITAL LITIGATION SECTION
(COUNSEL OF RECORD)
1275 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2997
TELEPHONE: (602) 542-4686

ATTORNEYS FOR PETITIONER

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REASONS WHY THE WRIT SHOULD ISSUE

I

THERE IS A CONFLICT AMONG THE STATES REGARDING HOW TO INTERPRET THIS COURT'S DECISION IN *RING V. ARIZONA*, 536 U.S. 584 (2002).

Pandeli acknowledges differences among the states regarding whether *Ring v. Arizona*, 536 U.S. 584 (2002), requires more than a jury determination (or a finding of harmless error) as to one aggravating circumstance that renders a defendant death eligible. Pandeli argues, however, that such differences reflect variations in state procedural laws rather than a conflict involving an important federal question. (Brief in Opposition at 15.)

Pandeli's argument ignores the various state courts' express reliance on, and interpretations of, this Court's Sixth Amendment analysis in *Ring*. In the instant case, for example, the Arizona Supreme Court cited *Ring* as the basis for requiring a resentencing notwithstanding a finding of harmless error regarding at least one aggravating circumstance:

> A narrow reading of *Ring II* may permit a judge to decide the existence of additional aggravating factors in the circumstances described by the State. As the State contends, once the government establishes any aggravating factor, a defendant becomes "death eligible" in the strict sense, and establishing additional aggravating factors does not render a defendant "more" death eligible. In our view, however, *Ring II* should not be read that narrowly. Although the Court there considered a death sentence based upon the existence of a single aggravating factor, *we conclude that Ring II requires* a jury to consider all aggravating factors urged by the state and not either exempt from *Ring II*, implicit in the jury's verdict, or otherwise established beyond a reasonable doubt.

State v. Ring (*Ring III*), 65 P.3d 915, ¶ 88 (emphasis added). *See also id.* at ¶¶ 91–94 (addressing whether "*Ring II* require[s] resentencing if a defendant conceded or did not challenge the aggravating factors found by the trial court?").

The state law question of when a defendant becomes "death eligible" is not at issue. The only question before this Court is whether a finding of death eligibility through a determination of harmless error regarding at least one aggravating circumstance satisfies the Sixth Amendment under *Ring v. Arizona*.

In *Johnson v. Nevada*, 59 P.3d 450, 459 (Nev. 2002), the Nevada Supreme Court similarly premised its decision to remand a capital case for resentencing on its interpretation of the Sixth Amendment requirement set forth in *Ring:*

> In light of the Supreme Court's decision in *Ring*, the instant case presents this court with the question: after a jury is unable to agree on a sentence in a capital case, does the finding of aggravating circumstances and imposition of the death penalty by a three-judge panel violate the Sixth Amendment?

Other state courts have similarly made clear that their post-*Ring* analysis turns on their interpretation of the Sixth Amendment requirements set forth in *Ring*. *See State v. Gales*, 658 N.W.2d 604, 623 (Neb. 2003) ("[W]e interpret *Ring* as affecting only the narrow issue of whether there is a Sixth Amendment right to have a jury determine the existence of any aggravating circumstance upon which a capital sentence is based."); *Brice v. State*, 815 A.2d 314, 322 (Del. 2003) ("*Ring* does not . . . require that the jury find every fact relied upon by the sentencing judge in the imposition of the sentence."); *Ex parte Waldrop*, ___ So. 2d ___, 2002 WL31630710 * 7 (Ala. 2002) ("*Ring* and *Apprendi* do not require that the jury make *every* factual determination"); *Torres v. State*, 58 P.3d 214 (Okla. Crim. App. 2002), *cert. den.*, 123 S. Ct. 1580 (2003) ("Oklahoma's provision that jurors make the factual finding of an aggravating circumstance beyond a reasonable doubt is all that *Ring* requires.").

The fact that the Arizona Supreme Court stated in *Ring III*, 65 P.3d at 943, that "the procedures urged by the State [ending the harmless error inquiry after a finding of harmless error as to one aggravator] do not reflect any sentencing procedure ever adopted by our legislature," does not change the analysis. Arizona's pre-*Ring* sentencing statute provided that the judge would make all factual determinations necessary for the sentencing decision, while the post-*Ring* statute assigns that entire role to the jury. The pre-*Ring* statute's provision for judge sentencing obviously resulted in error under

Ring. The error is not with *each* of the judge's factual determinations, but rather with factual determinations that expanded the sentencing range and made the defendant death eligible. *See Ring*, 536 U.S. at 597 n.4; *see also Apprendi v. New Jersey*, 530 U.S. 466, 481 (2002) (noting that judges are free to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute).

The Arizona legislature's post-*Ring* decision to enact a statute that provides for jury sentencing in capital cases is irrelevant to the only inquiry here: whether there was Sixth Amendment error, or whether any such error was harmless under the previous statute. Arizona's new statute has no bearing on that question; the Arizona legislature could have amended the statute to provide for a jury determination of only one aggravating circumstance, with the remainder of the sentencing determinations left to the judge. That is the approach the Nebraska legislature took in response to *Ring*. *See* 2002 Neb. Laws, L.B. 1, 97th Legislature, 3d Special Session. Neither the Arizona nor the Nebraska legislative response to *Ring* is determinative of what *Ring* requires. The new sentencing statutes in those states reflect a policy decision by the legislature and only become relevant if there is a finding that error under the old statute was not harmless and a resentencing is ordered.

Pandeli further argues that the extent of harmless error review that the Arizona Supreme Court chooses to undertake is outside the scope of certiorari review. (Brief in Opposition at 13.) Pandeli relies on this Court's holding in *Clemons v. Mississippi*, 494 U.S. 738, 754 (1990), that when constitutional error occurs in a capital sentencing, appellate courts in weighing states may either conduct harmless error review or remand for resentencing. In *Clemons*, this Court held that a state appellate court does not violate the Eighth or Sixth Amendments by undertaking to reweigh aggravating and mitigating circumstances after invalidating an aggravating circumstance. 494 U.S. at 745, 750.

The State agrees with the general proposition cited by Pandeli that an appellate court may choose to reweigh or to remand after invalidating an aggravating circumstance. That proposition is not relevant, however, in the instant case, because the Arizona Supreme Court did not invalidate either of the aggravating circumstances found by the trial court. The Arizona Supreme Court found that the first aggravator (prior conviction of a serious

offense) was outside the purview of *Ring*, and that the second aggravator (special cruelty, heinousness, or depravity) was established by overwhelming and uncontroverted evidence that Pandeli mutilated the victim's body after killing her. Thus, nothing has been deleted from the factors the trial judge weighed and balanced in sentencing Pandeli to death.

Furthermore, *Clemons* buttresses the State's argument regarding the scope of *Ring* error. In *Clemons*, this Court noted:

> Nothing in the Sixth Amendment as construed by our prior decisions indicates that defendant's right to a jury trial would be infringed where an appellate court invalidates one of two or more aggravating circumstances found by the jury, but affirms the death sentence after itself finding that the one or more valid remaining aggravating factors outweigh the mitigating evidence. Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.

494 U.S. 745. Based on *Clemons*, *Ring* error should be limited to instances in which there are *no* remaining valid aggravators, a situation that is not present in this case.

The State is not challenging the Arizona Supreme Court's right to engage in a harmless error analysis. Instead, the State challenges the Arizona Supreme Court's preliminary decision regarding what constitutes Sixth Amendment error under *Ring* in the first instance. In several Arizona capital cases pending on direct appeal at the time *Ring* was decided, the Arizona Supreme Court subsequently engaged in a harmless error analysis and was unable to find harmless error regarding the existence of any particular aggravating circumstance. The State has not sought certiorari review of that discretionary finding in any of those cases; review by this Court is only warranted where, as in the present case, the Arizona Supreme Court specifically found harmless error with regard to at least one aggravating circumstance, but nevertheless ordered a resentencing based on the Arizona Supreme Court's interpretation of what *Ring* requires.

Finally, Pandeli argues that the number of cases affected by this issue is limited. The State agrees that, given the recent legislative change to jury

sentencing in capital cases in Arizona, this Court's decision in this case will affect only a discrete number of Arizona cases. The Arizona Supreme Court has reversed some capital cases pending on direct appeal on other grounds or because it ruled that *Ring* error was not harmless as to the finding of any aggravating circumstance. Discounting those decisions, this Court's decision still directly controls the outcome of approximately 20 cases in Arizona alone. That number of cases remains of great significance to the State of Arizona and to the victims in each case.

Furthermore, as evidenced by the arguments set forth in the Brief of Nebraska, Alabama, Colorado, Delaware, Missouri, Montana, Oklahoma, and Virginia as *Amici Curiae*, the issue has significance outside of Arizona. For example, Nebraska and Montana's capital sentencing statutes currently provide for a jury determination of facts that expose a convicted murderer to the death penalty, but leave to the judiciary the role of determining the appropriate sentence. (Amicus Brief at 1.) Absent guidance from this Court, the viability of those statutes remains questionable.

Additionally, in *Summerlin v. Stewart*, 2003 WL 22038399 (9th Cir. Ariz. Sept. 2, 2003), the United States Court of Appeals for the Ninth Circuit ruled that this Court's decision in *Ring* applies retroactively to cases on collateral review. Unless this Court reverses that decision, it will place hundreds of additional capital sentences at risk if the Arizona Supreme Court's interpretation of *Ring* prevails.

II

THE ADDITIONAL ISSUES PANDELI RAISES ARE IRRELEVANT TO THIS COURT'S DECISION WHETHER TO GRANT CERTIORARI REVIEW; PANDELI'S FAILURE TO FILE A CROSS-PETITION PRECLUDES CONSIDERATION OF THOSE ADDITIONAL ISSUES.

Pages 17 through 35 of Pandeli's Brief in Opposition raise a number of issues he presents under the heading of "The Arizona Supreme Court's Disposition Of This Case Can And Should Be Affirmed On Other Grounds." The Arizona Supreme Court resolved those issues adversely to Pandeli. They are independent from the issue presented in the pending certiorari petition, and Pandeli should have raised them in a conditional cross-petition. *See, e.g., Kugler v. Helfant*, 421 U.S. 117 (1975). Rule 12(5) of the Rules

of the Supreme Court of the United States sets forth a procedure that ensures an adequate opportunity to respond to a cross-petition. Under Rule 12(5), a respondent seeking to file a conditional cross-petition must file it within 30 days after docketing of the certiorari petition. "The time to file a conditional cross-petition will not be extended." *Id.* The cover of the cross-petition must indicate clearly that it is a conditional cross-petition, and the cross-petitioner has the duty to promptly notify cross-respondents on a form supplied by the Clerk of the Court of the date of filing and the date the cross-petition was placed on the docket. *Id.*

Because Pandeli has not filed a cross-petition, and the time for filing such a petition has expired, this Court should not consider the issues raised for the first time in Pandeli's Brief in Opposition.

CONCLUSION

There is a conflict among the states regarding an important federal question, *i.e.*, whether, under *Ring v. Arizona*, the Sixth Amendment jury trial guarantee requires anything more than a jury finding (or a finding of harmless error) relating to the existence of an aggravating circumstance that makes the defendant eligible for the death penalty. The Arizona Supreme Court's interpretation of *Ring* as requiring a jury determination of every sentencing factor (including additional aggravating circumstances and the weighing and balancing of aggravating and mitigating circumstances) improperly expands the Sixth Amendment holding in *Ring*. Accordingly, the State of Arizona respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

TERRY GODDARD
Attorney General

KENT E. CATTANI
Chief Counsel
Capital Litigation Section
(Counsel of Record)

Attorneys for PETITIONER

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